# Central Law Journal.

ST. LOUIS, MO., FEBRUARY 15, 1918.


## PROOF OF VENUE IN A CRIMINAL CAUSE NOT TO BE BEYOND REASONABLE DOUBT WHERE ONLY LOCAL JURISDICTION IS INVOLVED.

The Supreme Court of Louisiana, while approving what it says is the minority ruling by American Courts, that venue must be proved in a criminal case by evidence beyond a reasonable doubt, yet says that this principle is subject to an exception, where the question arises out of claim, that the vicinage of an alleged offense is not where an alleged offender is being tried but elsewhere in the state. In the latter event a preponderance in proof only is required. State v. Jackson, 77 So. 196.

The Court, in a majority opinion said: "It is no doubt true, we think, that where venue is an essential element of a crime, it must be proved beyond a reasonable doubt, but where it is proved beyond a reasonable doubt or conceded that an act denounced by the law of a particular state as a crime has been committed within the territorial limits where that law prevails, the question whether it was committed within the limits of one political subdivision of the state or another concerns as we have said, not the guilt or innocence of the person accused, but merely the question of the place and the court in which he shall be prosecuted; and that being the case, we are of the opinion that such fact may be established by a preponderance of the evidence to the satisfaction of the jury."

While we are rather of the opinion that what is said to be the "majority rule," that venue, whether that be an essential element in crime or not, need only be shown by a preponderance of evidence, yet think there is such a distinction as the Louisiana court points out. Subdivisions in a state are for its own policy, and the fact that changes of venue may be taken by the prosecution or by defendant because of local or other reasons, proves that this policy is not inflexible.

This thought seems to enforce the view, that venue at one place or another in the territory covered by a general law is not intensely jurisdictional. It is more accidental. It is established more as representing convenience than necessity, though it be stated to be exclusive when established.

A dissenting judge goes upon the theory, that our common law and constitutional guarantees make of venue an essential qualification in a charge of crime. But so far as regards our common law, even if we concede that in general language it shows opposition to the view of the majority of the court, yet the question of venue ought to be raised, in a court of a state denouncing a crime committed in its borders, by special plea and have that determined by a jury as a preliminary fact. If a defendant fails so to plead, he ought not to have the right to gain an advantage in having the question treated as an essential ingredient of crime charged as crime.

As to constitutional guarantees, the same observation may be made, especially as these guarantees recognize the creation of vicinage by domestic statutory regulations and lawful subdivisions within states. Though as to such subdivisions a defendant may be vested with constitutional rights, yet they are not of the kind he is powerless to waive. We greatly doubt whether if the real venue were in one state and prosecution were in another his consent would vest the court of another state with jurisdiction over the subject matter.

A concurring judge holds that the plea to the jurisdiction was correctly decided by the judge because it involved no question of guilt or innocence and therefore was properly triable by a judge. This may be correct, but, if there is a dispute or a con-

flict as to the county in which the alleged offense was committed, and therefore, judicial cognizance was unable to say whether a particular court had jurisdiction to try it, this would seem to present a jury question. But after all as to how such a plea should be disposed of concerns more the practice in a particular state than a question of general law. The concurring judge was right, however, in saying that the question was not one of guilt or innocence.

We have not found any case where this particular question heretofore has arisen, but we do not doubt that a statutory rule for disposing of a question of this kind would not offend constitutional guarantees of the right of trial by jury in the vicinage of an alleged offense.

## NOTES OF IMPORTANT DECISIONS.

INTERSTATE CARRIER — REPARATION CLAIM NOT AFFECTED BY SHIPPER BEING OBLIGATED TO CUSTOMERS.—In 85 Cent. L. J. 242, there was noticed a ruling, by Ninth Circuit Court of Appeals, to the effect that a shipper cannot be deprived of the reparation provided by law by the carrier showing in his business that excess freight paid by him was passed along to his customers in his selling price. N. Y., N. H. & H. R. Co. v. Ballou & Wright, 242 Fed. 862.

By U. S. Supreme Court in So. Pac. Co. v. Darnell-Faenzer Lumber Co., 38 Sup. Ct ———, the principle thus above stated is approved, the reasons therefor being stated by Justice Holmes as follows:

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. Olds v. Mapes-Reeve Construction Co., 177 Mass. 41, 44. Perhaps, strictly, the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios*, with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier: State v. Central Vermont Ry. Co., 81 Vt. 459. See Nicola, Stone & Myers Co. v. Louisville & Nashville R. R. Co., 14 I. C. C. 199, 207-209; Baker Manufacturing Co. v. Chicago, Northwestern Ry. Co., 21 I. C. C., 605. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum: New York, New Haven & Hartford R. R. Co. v. Ballou & Wright, 242 Fed. Repr. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its untimate result: 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts."

In further reasoning the justice distinguishes between cases where recovery for discrimination is by those paying reasonable rates and complain because of lower rates being given to others. As to such cases the justice says: "The damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should have been required of them."

This is not a very illuminating statement in view of the fact that the carrier was contending that no damage was suffered at all by the shipper. The matter was better stated by Ninth Circuit Court of Appeals, which said that in a reparation case the court would not be diverted into a wholly collateral issue, which in fact was between shipper and his customers.

COMMERCE—ADVERTISMENTS IN NEWSPAPERS PRINTED IN FOREIGN STATE VIOLATING LOCAL POLICY.—It has been held by U. S. Supreme Court that a state statute preventing personal solicitation by an agent of a non-resident dealer in intoxicating liquors is valid. Delamater v. South Dakota, 205 U. S. 93. And Alabama Supreme Court has held that under said ruling a state statute forbidding the sale within the state of newspapers containing liquor advertisments applied as well to newspapers printed elsewhere as in the state, State ex rel. Black v. Delaye, 193 Ala. 500, L. R. A. 1915 E. 640.

In Post Printing & Publishing Co., v. Brewster, 246 Fed. 321, decided by District Court of Kansas, it is held that a Kansas statute forbidding the sale and advertisment of cigarettes did not apply to a newspaper printed in Missouri and sold in Kansas.

It must be conceded that newspapers and the information they contain are interstate commerce, but this necessity may or may not mean that, because they may advertise in Missouri the sale of cigarettes where they lawfully may be sold, they may do the same thing in Kansas. The Delamater case held that a traveling agent could not solicit sales of liquor in prohibition territory in South Dakota, and the Delaye case said advertising was but a form of solicitation for sale. The Brewster opinion says that these cases are distinguishable from it which concerns cigarettes because of the Wilson act.

We do not, however, perceive this distinction. Domestic policy can prevent further disposition of property admissible into a state. When it has gone into the mass of property in a state, it becomes subject to local police power. A peddler cannot carry on his business merely because he is peddling articles shipped to him in interstate commerce, without paying a license required to peddle. May not a state, when a foreign newspaper containing an advertisement for things to be sold in a state in violation of its laws, forbid the sale of the newspaper? If it can restrain a peddler from selling cigarettes, may it not prevent soliciting advertisements intending to effect a sale?

In Browning v. Waycross, 233 U. S. 16 it was held not interstate business to send an agent to put up lightning rods shipped in interstate commerce. Is it interstate business to forbid the distribution of an article sent into a state forbidden thus to be disposed of? The commerce clause it may be said secures the right to purchase and sale and necessarily delivery to purchaser. But the latter has no more right to dispose of what is delivered, than if an article formerly was not in interstate commerce at all.

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BENEFICIAL ASSOCIATION — RETROSPECTIVE OPERATION OF BY-LAWS.—In Fitzgibbon v. Bowen, 165 N. W. 1059, the Supreme Court of Minnesota interprets a by-law for affording relief to members suffering permanent injury incapacitating them for work as extending to an injury so resulting in the past even prior to the existence of the by-law.

The by-law in this case says: "Any member having a continuous membership of ten years who, by reason of permanent injury, not contributed to or brought about by his own improper conduct, is totally incapacitated for work may receive the sum of $5.00 per week."

The facts show that plaintiff joined a beneficiary association in 1903, and suffered an injury in 1905 that incapacitated him for work. At that time there was no pension plan for members of the association, but one was adopted in 1914, in which plan the above by-law was embraced. There was a levy of 25 cents per month on all the membership of the association to maintain a fund for the plan.

The court, after premising with the statement of rule that there should be liberal construction of such a by-law, said that this by-law "must be construed to provide for all of its members, who were then or might thereafter become totally incapacitated for work. It speaks in the present tense. To say that an assessment was placed upon all members, those incapable of performing work as well as those capable, and deny those incapacitated from the benefits thereof, would, in our opinion, do violence to the purpose and intent for which the order was organized."

The court's assumption that the order was organized to establish a pension fund is contradicted by the facts. It had existed for years without having provided for such a fund. When it provided therefor it would be thought to be acting only prospectively and not also retrospectively.

But this construction also violates an inherent principle in such an organization, namely, the principle of equality of burden and equality of benefit. To allow one member to be paid for a past injury and to confine others to prospective injuries puts members on an inequality.

Take the case in hand and the construction adopted compels the association to pay $5.00 a week arising as a certainty in consideration of dues of 25 cents a month. Why this gratuity, when the member though suffering from a permanent injury may have had hopes of recovery therefrom?

If he had, then, as to future permanent injury he is placed on an exact equality with members generally. All of this ignores the general rule of construction applicable to statutes, ordinances and rules operating prospectively, unless it is evident they also operate retrospectively. See Lynch v. Turrist, 236 Fed. 653, 149 C. C. A. 649; Jacobs v. Colgate, 217 N. Y. 235, 117 N. E. 837. It is said this occurs more often with remedial and curative statutes than with others. Waddill v. Masten, N. C. 90 S. E. 694. But of all contracts aiming solely at future contingencies an insurance contract is by its very nature such a one.

## WAR LEGISLATION.*

The beginning of the New Year finds the greatest nations still in deadly war. Our own republic, after more than two and one-half years of hesitation was irresistibly drawn into the conflict. Perhaps it is yet too soon to anticipate the verdict of history as to the final causes, but it seems apparent that the predominant reasons for the catastrophe are to be traced to the opposition of two ideals. On the one hand, the unmoral Prussianized leaders of modern German thought rejected with scorn the theory of a democratic government, while on the other, all who consciously, or unconsciously, are striving to maintain the essential dignity of the individual man, are arrayed either actively or in sympathy in support of democracy. It has been well said that "there have been earlier crises out of which human fate proceeded in new directions; but the contestants in those conflicts understood only obscurely, if at all, the ultimate stakes for which they were fighting. We can plead no such ignorance. We know the issue and whither it leads."[1] If the mighty power which now threatens to engulf the ancient land of Europe and stretch its military and commercial empire from Berlin to Bagdad should succeed, it would reverse the progress made during two thousand years of effort towards the attainment of the Christian philosophy of government and abase the whole world before the War Gods of Northern Paganism. The cruel selfishness of Thor and Woden would supplant the religion taught by the Divine Redeemer of mankind, a religion which however imperfectly it has been practiced by the masses of men, has been the only real cause of those blessings which make civilized life as we know it at its best.

For forty years, under the guidance of their statesmen, their philosophers, their historians and their poets, the German people have learned a lesson of cruelty and hardness, while with a persistency and thoroughness unprecedented in history they have perfected the devilish enginery of destruction. Their armies of spies have sought out the hidden secrets of all nations and peoples. No art of treachery has been left untried as the complement of brutal force. From the great body of perverted intellect which has aided their propaganda, that of Nietzsche stands out as perhaps the most effective. Thus he formulates their answer to the religion first preached by the Crucified:

"Ye shall love peace as a means to new wars and the short peace more than the long.

"Ye say it is the good cause which halloweth even war! I say unto you that it is the good war which halloweth every cause. War and courage have done more great things than charity. * * * Be not considerate of thy neighbor. * * * What thou doeth can no one do to thee again. Lo, there is no requital.

"Thou shalt not rob! Thou shalt not slay! Such precepts were once called holy. * * * Is there not even in all life robbing and slaying? And for such precepts to be called holy, was not truth itself thereby slain? * * * * This new table, oh, my brethren, put I up over you: Become hard."[2]

Whole volumes have been made up of such diabolism; and the genesis and conduct of the present war have shown too well that the German people have been apt scholars. Where the tread of their columns has fallen they have left only marks of devastation. St. Jerome has been quoted as saying: "When the barbarian ancestors of these modern savages fell upon the Roman Empire, they left naught but earth

*This article is a revision of an address delivered by Hon. Walter George Smith, President of the American Bar Association, on January 2, 1918, to the Vermont Bar Association. We are glad to publish this very timely article by Mr. Smith, who has graciously consented to act as one of our associate editors, and whose articles and editorials in recent issues have been read with great interest by our subscribers.

(1) William Roscoe Thayer.

(2) "Thus spoke Zarathrusta." Translated by Thomas Common, pages 52, 242, 243, 246 and 262. "Out of their mouths," pages 33 and 34.

and the sky." Upon the sullen retreat of the Kaiser's armies from France, the earth itself was destroyed.

We need not dwell upon the atrocious incidents which have outraged every better human instinct, whether by the torture and murder of men, women and children, in bombardment of hospitals and undefended dwellings and school houses, or the destruction of the noblest monuments of antiquity. It is patent that the civilized world has girded itself for a mighty struggle for the preservation of all that makes life worth living. Failure means the contemptuous overthrow of a democracy and the enthronement of outworn tyranny. All that has been gained for mankind by four centuries of growth of the principles of self-government on the American continent is at risk, for it is fatuous to believe that a triumphant Prussian junkerdom would permit the continuance of the living protest against its iniquity embodied in our democratic republic. Though we are confident we should win in the end, it would be at heavy cost.

In this crisis of the world's affairs our national government is bending all of its powers to concentrate and mobilize our resources for effective action. Our soldiers are in France, our destroyers are coping with submarines, our young men are being drafted into the military and naval service and are training in camp. Food and fuel, the great staples of foreign and domestic commerce, the transportation systems by land and water are taken under government regulation. Direct and indirect taxes in many forms are levied, capital is invested in government loans and financial stability is tested by withdrawing from active business and from investments sums, the magnitude of which staggers the imagination. These are the obvious physical means for coping with the unprecedented peril; but there are other considerations and other means of even greater importance. In the language of one who is an active participant, "This war has turned out to be not merely a military war. Its final decision will depend much more upon political, economical and psychological than upon merely military factors.[3]

The outbreak of the war came with such suddenness as to find this nation unprepared in every way. We were so engrossed in our own domestic matters that we had followed with but little real interest the political and military plans of the Central Powers of Europe, though it required no spirit of prophecy during the past generation to foretell their outcome. Even after the invasion of Belgium and the tragedy of the Lusitania there were large bodies of our people who still believed it possible to maintain our neutrality. Although our foreign population with a large part of those born of foreign stock and speaking and reading foreign languages and maintaining as far as possible a foreign attitude of mind, formed nuclei for disloyal plots, it was with surprise we witnessed the outcome in a wholesale destruction of life and property in pursuance of plans traced to the embassies of Germany and Austria while we were still at peace. It may be doubted whether even now there is a thorough realization of the danger to our dearest ideals and interests from any relaxation of effort by any part of the community.

The national administration has made a special appeal to the lawyers of all the states to aid its efforts in making effective the conscription laws so that no injustice be done to any individual. The American Bar Association has responded by putting its vice-presidents, local councils and its entire membership in the various states at the disposal of their governors. It is not probable that these duties will impose onerous obligations on more than small groups, but there is a more general and more important duty that the American lawyers may and should perform each in his separate sphere and in the various organizations which give

(3) The Coming Victory, Gen. Smuts.

voice to professional opinion. It lies in making known the underlying rights and obligations of the citizens of the United States in war time, and especially in removing the false notions widely spread by malicious or ignorant men that the war measures of the government are without constitutional warrant and are therefore tyrannical and legally void. The nearest precedents for existing conditions are to be found in the events of the war for the Union from 1861 to 1865. They show a close analogy between the questions of constitutional power of the legislative and executive departments of the government in that crucial period, and in this.

The late Chief Justice Agnew, of Pennsylvania, in an address delivered at Harrisburg in March, 1863, when civil war was flagrant, treats with his accustomed clearness the constitutional limitations of the power of Congress and of the President in peace and in war. Although his attention was especially directed to the power to suppress insurrection, his observations are apposite for existing conditions.

"Some of its (the Congress') powers relate to a state of peace," he says. "Others to a period of war; and the fact first striking the attention of a jurist is that no correct exposition can be made of the latter in a frame of mind that looks alone to a state of peace, before the clangor of arms has aroused its dormant energies. It must not be overlooked that as war class rises, the peace class necessarily falls; not because they become extinct, but because the inherent vigor of the Constitution itself brings the war powers into play to meet the exigency and relaxes the latter to admit the free use and full scope of the former." After referring to the specific powers granted in Art. 1, § XIII, with a special reference to the clauses relating to the military power, XI to XVI, he quotes Clause XVIII, Art. I, of the Constitution, authorizing Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all powers vested by this Constitution, in the government of the United States or in any department or officer thereof." Whenever this clause has come before the court for interpretation, the great decision of Chief Justice Marshall in McCullough v. Maryland[4] has been the beacon. Although rendered in exposition of a peace power, it is not the less applicable to one relating to war. "We admit," he says in words often quoted, "as all must admit, that the powers of the government are limited and that its limits cannot be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers that it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution and all means appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the spirit and the letter of the Constitution, are constitutional."

A recent commentator has summed up the trend of the decisions of the Supreme Court since the Civil War, which have left beyond the range of controversy what was too often disputed before that war, that the sovereignty of the national government is the fundamental premise, from whatever angle we may approach the subject, whether it be administrative efficiency or the exercise of any other constitutional power. "In short," says this writer, "it may be stated as an established principle of our constitutional law that the supreme purpose of our constitution is the establishment and maintenance of a state which shall be nationally and internationally a sovereign body and therefore that all limitations of the Constitution expressed and implied, whether relating to the reserved rights of the state or to the liberty of the individual, are to be

(4) 4th Wheaton, 312.

construed as subservient to this one great fact.[5]

Therefore, just as President Lincoln was clothed with power and enjoined by his oath of office, as Judge Agnew pointed out, more than one-half century ago, to use the whole military power of the government to suppress domestic insurrection and to see that the laws be executed, so in these days by virtue of his authority as Commander-in-Chief of the Army in pursuance of congressional legislation, President Wilson in the exigency of foreign war is called upon to act in a similar way. The use of this great power rests upon the discretion of the President to an almost unlimited extent. "Congress," says Judge Agnew, "could not foresee all the movements and resorts of the enemy and those adhering to him; nor the embarrassment attending the measure to subdue him. A war of force from its nature knows no rule of action nor where the force must be used to meet the exigency." He then shows the difference between the state of constitutional rights in time of peace and of war. In time of peace none can be taken away except by due process of law, but in time of war even the rights of life, liberty and property must sometimes yield to inexorable military necessity. The citizen may be drafted into the military service, his property may be taken for public use. While it is sometimes said that this necessity overrides the Constitution, the learned judge shows that the Constitution, in the clauses we have referred to, itself recognizes the necessity of force and Congress acts within constitutional limits in placing the forces of the nation in the power of the President.

"The injunction of the Constitution and the Acts of Congress in pursuance are a grant of express, unlimited, unconditional authority to use the whole physical force of the nation according to his own judgment in quelling traitors, their aiders and abettors, and compelling them to submit to the law; and * * * this express grant without limitation for a purpose involving the very life of the nation and the defense and preservation of the Constitution on every principle of law, logic and necessity requires the exercise of all incidental powers necessary to the execution of the main purpose of suppressing the insurrection." He continues:

"The rights of the loyal also yield to the necessities of war. The law abiding citizen must shoulder his musket and lay down his life on the battlefield; his liberty is restrained by discipline; his property taken and destroyed for a military purpose."

And again, "If then the stern necessity of war demands the sacrifice of fundamental God given rights, what exemption from the same necessity can be claimed for the minor guarantees of the Constitution? On what higher foundation rests the freedom of speech and of the press? They are but the outposts set to guard the higher rights of life, liberty and property."

This vigorous exposition of the executive power, if taken without consideration in the light of Supreme Court decisions subsequently made, which it cannot be doubted would have met the approval of the distinguished jurist, might lead to the conclusion that by Act of Congress the President can be legally vested with the powers of a dictator and the safeguards imposed by the English law since Magna Charta be swept away whenever in the judgment of Congress the exigency of the public safety requires the sacrifice. The consequences of such an interpretation of the Constitution would be too far-reaching for adequate description. At the first onset of war, defenses against arbitrary power, won by centuries of struggle, would fall like a house of cards. There were those who feared this danger in the dark days of the Rebellion, when loyal states were honeycombed with treason and insidious attacks upon the government within the lines were feared even more than the gallant foe who openly sought to disrupt the Union.

(5) Willoughby on the Constitution, Sec. 36.

In 1866 there came before the Supreme Court of the United States the famous case of Ex parte Milligan.[6] The petitioner in the court below, a citizen of Indiana, had been tried before a military commission for treasonable practices and had been sentenced to death by order of the commander of the department. The judges being divided in opinion as to the legality of this summary proceeding under martial law, while the civil courts were open, and there were no military operations carried on within the borders of the state, certified the question for decision to the Supreme Court. The proceedings had for their warrant the President's proclamation of September 24, 1862, ordering:

"That during existing insurrection and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia draft, or guilty of disloyal practices affording aid and comfort to rebels against the authority of the United States shall be subject to martial law and liable for trial and punishment by court-martial or military commissions.

"That the rights of habeas corpus is suspended in respect to all persons arrested or who now or hereafter during the Rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by sentence of a court-martial or military commission."

Obviously no cause involving graver consequences could be presented for decision. Counsel drawn from the leaders of the profession appeared on either side. For the petitioner, Jos. E. McDonald, Jeremiah S Black, James A. Garfield and David Dudley Field; for the government, Attorney-General Speed, Henry Stanbery and Benjamin F. Butler. Their arguments exhausted the history of precedents, the philosophy of government in its relation to criminal trials and the long upward struggle for the individual rights of English speaking men. Counsel for the government sought to minimize the safeguards of the Fourth, Fifth and Sixth Amendments of the Constitution, relating to unreasonable searches, due process of law and civil rights in trials for crime, in much the same language as that already quoted from Judge Agnew's address:

"These in truth," said Benjamin F. Butler, "are all peace provisions of the Constitution and like all other constitutional and legislative laws and enactments are silent amidst arms when the safety of the people becomes the supreme law." The trenchant words of Jeremiah S. Black, however, found response in the minds of American lawyers everywhere, as they did in those of the justices before whom they were uttered. "I think," said he, "it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. In peaceable and quiet times our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage and goes surging up against the barriers which were made to confine it, we need the whole strength of an unbroken Constitution to save us from destruction." The opinion of the court was delivered by Mr. Justice Davis. It was unanimous upon the main question involved, deciding that the military commission was without power to try the petitioner. The theory that necessity can abrogate any of the provisions of the Constitution was swept aside in emphatic terms. "The Constitution of the United States," said the court, "is a law for ruler and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; for the govern-

(6) 4 Wall. 120.

ment within the Constitution has all the powers granted to it which are necessary to preserve its existence; as has been aptly proved by the result of the great effort to throw off its just authority. * * *

"The laws and usages of war * * * can never be applied to citizens in states which have upheld the authority of the government, where the courts are open and their process unobstructed." The Chief Justice and Justices Wayne, Swayne and Miller, while concurring with the majority of the court, made two reservations: "(1) When the right of habeas corpus is suspended, the executive is authorized to arrest as well as to detain the suspected person; (2) There are cases in which the privilege of the right being suspended, trial and punishment by military commission in states where civil courts are open may be authorized by Congress as well as arrest and detention."

Willoughby, commenting upon the opinion of the court in Ex parte Milligan, thinks it is too absolute for it to say, as it did, that "martial law cannot arise from a threatened invasion, the necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." He thinks it is correct to say that the necessity must be actual and present, but not that the necessity cannot be present when the courts are closed, for, as the minority judges correctly point out, there may be urgent necessity for martial rule even when the courts are open." He concludes, "That the better doctrine is to test the necessity for an act under martial law by its special circumstances."[7]

Ex-Justice Charles E. Hughes, in his recent admirable address upon War Powers Under the Constitution, before the American Bar Association at Saratoga, after making the same quotation, expresses the opinion that "certainly the test should not be a mere physical one, nor should substance be sacrificed to form." One of the most learned commentators on the Constitution, the late Judge J. I. Clark Hare, felt that undue bounds had been given to the military power by the court after the Civil War, notwithstanding the decisions of Mitchell v. Harmony,[8] and Ex parte Milligan, by the decisions in the cases of Mitchell v. Clark[9] and Coleman v. Tennessee.[10]

He says, "Despite the judgment in Ex parte Milligan, the Supreme Court * * * recently countenanced the Act of March 3, 1863, which virtually established martial law by arming the President and officers under his command with the dictatorial power to deprive any man, whom they regard as inimical, of liberty and property. Agreeably to the fourth section, "Any order of the President or under his authority made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal * * * for any search, seizure, arrest or imprisonment * * * under and by virtue of such law or under color of any law of Congress." This statute, he thought "operated as a declaration of martial law throughout the length and breadth of the United States. * * * It is directly in the teeth of the principles laid down in Ex parte Milligan and may hereafter serve as a foundation on which to rest government by the sword."[11] The decision in Mitchell v. Clark is indeed hard to reconcile with Ex parte Milligan. The military commander at St. Louis had expropriated for the military chest the rent of certain storehouses in the city of St. Louis. His order was deemed a sufficient defense to an action to recover these rents, in view of a statute passed by Congress imposing a statute of limitations fixed at two years. The court had had before it a similar question in Bean v. Beckwith,[12] where it was held

(7) Wil. on Const., Sec. 734.

(8) 13 How. 113.
(9) 110 U. S. 633.
(10) 97 U. S. 514.
(11) 2 Hare Const. Law, 983.
(12) 13 Wall. 510.

that the defense applied solely to acts done under authority given specifically by the President, but in the case of Mitchell v. Clark the act was done without such direct authority by order of the general in command. As was said by the Supreme Court in that case, "possibly in a few cases acts might have been performed in haste and in the presence of overpowering emergency for which there was no constitutional power anywhere to make good." Stating further, that there can be no doubt of the power of the Congress to pass an act of indemnity.

Obviously in a time of war or insurrection, acts which in time of peace would be a violation of private right, must be tested by the touchstone of necessity, as was fully laid down by Chief Justice Taney in Mitchell v. Harmony. Firm ground was established by the case of Ex parte Milligan, however, and it cannot be doubted that its doctrine, with the necessary consideration of varying conditions of war or peace, is authoritative.

It establishes that the Constitution in all of its parts is the ever living guide for the conduct of all branches of the government and no part either in peace or in war ceases to extend its beneficent protection. Therefore we may look with satisfaction upon the extraordinary and energetic response made by the Congress of the United States in its last extra session to the duties laid upon it by German aggression, feeling that the drastic measures taken for the protection of the country are all within constitutional limitations.

On April 6, 1917, war was declared in the following joint resolution:

"Whereas, the Imperial German Government has committed repeated acts of war against the people of the United States,

"Resolved by the Senate and the House of Representatives, that a state of war between the United States and the Imperial German Government which has thus been thrust upon the United States, is hereby formally declared; and that the President be and he is hereby authorized and directed to employ the entire naval and military force of the United States and the resources of the government to carry on war against the Imperial Government of Germany, and, to bring the conflict to a successful termination, all the resources of the country are hereby pledged by the Congress of the United States."

How well this solemn pledge has been carried out is being brought home to every American citizen of the land. A summary of the legislation enacted since the memorable declaration of war, whatever may be the mistakes in detail and inequalities which experience may develop and which will doubtless be corrected, shows that it redounds to the credit of our national legislature, both for its patriotism and its industry.

By the Act of June 15, 1917, the war powers are strengthened by the addition to the criminal code of provisions governing acts of espionage, giving information to the enemy, conspiring to injure property in foreign jurisdictions, unlawful use of the mails, and interference with commerce by violence. By the same act the President is authorized in his discretion to lay an embargo on foreign commerce. By other acts the military and naval forces are increased and strengthened and their equipment provided for. The detention of our own vessels, internment camps and cognate subjects are regulated, including the seizure of foreign vessels and their use in the service of the United States. A bureau of war risk insurance for vessels is created and the seizure of enemies' property directed. By the Act of August 10, 1917, to encourage production, conserve the supply and control the disposition of food products and fuel, the President is given power to fix prices of necessaries, forbid hoarding, take over factories, pipe lines, packing houses, mines or plants, requisition food and supplies for army and navy, purchase, store and sell

food, prescribe regulations for or wholly prohibit exchanges or boards of trade from carrying on operations, fix the price of wheat, forbid the distillation of spirits, regulate the manufacture and importation of malt or vinous liquors, fix the price of coal, regulate the sale or take over the plant, with all the necessary powers incident to the exercise of his discretion in these various directions, fixing heavy penalties upon those who seek to resist or avoid his orders.

With such powers legally in the hands of the Executive, our democratic form of government shows itself compact and effective. Our resources in men and material are at the command of the President as completely as though we were an autocratic instead of a democratic nation, but with this vast difference: In an autocratic government such powers are inherent in the ruler, with us they will be ended by the same power which granted them. Meantime, the courts are always open and the humblest citizen is within their protection. Therefore it is, that notwithstanding the inquisitorial power of the government, whether it be exercised in relation to taxation or the regulation of business or of the professions, a power which has only begun to make itself felt in daily life, the patriotic devotion of the masses of our people rises higher day by day, as they realize the crisis in the world's history and the direful consequences of a failure to make good the pledges of our Congress. We are strongly resolved to yield everything demanded, to save democracy. The prescient wisdom of the founders of our Constitutional system receives confirmation in every test and we may confidently believe we shall emerge from the present conflict with every safeguard of individual liberty unimpaired.

WALTER GEORGE SMITH.

Philadelphia, Pa.

## MASTER AND SERVANT—ACT OF GOD.

### MATTHEWS v. CAROLINA & N. W. RY. CO.

Supreme Court of North Carolina. Dec. 23, 1917.

94 S. E. 714.

A railroad owes no duty to send an engine to remove the goods in a shanty car in which a servant has been allowed to live and which is endangered by a rising flood.

BROWN, J. The evidence tends to prove that plaintiff was employed by defendant as an assistant coal heaver at its coal chute at Cliffs, a station on Catawba River. By permission of defendant, plaintiff and his family occupied as a residence two unused shanty cars located on a side track near the chute. They lived in the cars with their household effects from May 1 to July 16, 1915. On that night an unprecedented flood swept over the banks of the Catawba, submerged the shanty cars, and destroyed plaintiff's property therein.

The evidence shows that during the day of the 16th, before the water reached the track on which the shanties were located, a freight train in charge of Conductor Winkler passed Cliffs going towards Hickory. Nothing was said to Winkler by the plaintiff, Matthews, or by Askew, his foreman, about moving the cars. After the freight train passed in the afternoon, Askew, plaintiff's brother-in-law, phoned the defendant's shops at Hickory and requested that an engine be sent out to move the shanty cars. At that time the water had not reached the shanties. He was told that there was only one engine there and that had to be held on account of a washout on the line at another point. It had required Winkler from 2:30 until 6 o'clock that same afternoon to get his train from Cliffs to Hickory, a distance of two or three miles.

The court overruled a motion to non-suit which is assigned as error. The exception is well taken. We know of no principle of law that imposed upon the defendant the legal duty to protect and rescue plaintiff's chattels from the destructive consequences of an act of God. The plaintiff was occupying the shanty cars as a residence by permission of defendant. His relation to defendant was that of a servant who has brought his effects upon the master's premises by his permission, the servant retaining personal control of his property. The law imposes no duty upon the master to rescue his servant's goods from the consequences of a destructive agency for which the master was in no way responsible. The cause of the destruc-

tion was the act of God, and not that of the master. 1 Labatt, 15. The rule is thus stated by the Georgia court in Allen v. Hixson, 111 Ga. 460, 36 S. E. 810:

"When an employe, without fault on the master's part, becomes placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employe's speedy release. Being in no way responsible for the unfortunate occurrence, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability." 24 Cyc. 1072, and notes, and note to 42 L. R. A. (N. S.) 363.

To illustrate: Suppose plaintiff had been a farmer's tenant residing in a tenant house on the banks of the Catawba, and when the flood began to rise he had telephoned his landlord to bring his team and remove his household goods, and the landlord had failed to do so. Would the landlord be liable? Certainly not. The law imposes no such duty on him, although humanity did. Causes of action arise only for violations of duties imposed by municipal law. Unfortunately for plaintiff, he failed to have his cars attached to Winkler's freight train as he could have done, and when he phoned to Hickory for help, the defendant's only engine there was necessarily detained to meet another pressing demand. Had this not been so, we doubt not that it would have been sent to plaintiff's relief.

The position that defendant may be held as a bailee of the household goods is untenable. Possession and control are essential elements in the law of bailment. The defendant was not in possession of the goods simply because they were in its shanty cars, any more than a landlord would be in possession of his tenant's household effects simply because he had furnished the tenant a house to live in. 6 Corpus Juris, 1102.

The motion of non-suit is allowed.
Reversed.

NOTE.—*Distinction Between Duties Devolved by Law and those by Contract as Excused by Act of God.*—The instant case proceeds on the principle that there was no duty whatever in the railroad to protect the property involved from the destructive consequences of an act of God, at the same time arguing that there was no duty even to protect it though destroyed not through act of God. Taking it, however, that there is a situation or room for a reasonable contention as to a situation in which the defendant owed a duty to plaintiff to protect the property involved, what is the rule as to act of God causing its destruction?

At an early day the rule was laid down that, if a party by contract creates a duty on himself he is bound to make it good notwithstanding by any accident or inevitable necessity performance has been rendered impossible. Paradine v. Jane (1647), Aleyn (Eng.) 26. It was said he should have provided against this in his contract. But it has been said that: "Where the law creates a duty or charge and the party is disabled to perform it without any default in him and he hath no remedy over these, the law will excuse him." If, however, he creates a charge upon himself, *secus*. Clifford v. Watts (1870), L. R. 5 C. P. (Eng.) 577. It has been held also that actual adjudications come far short of sustaining the rule as broadly stated in the Paradine case. Pengra v. Wheeler (1893), 24 Or. 532, 34 Pac. 354, 21 L. R. A. 726.

In Bunn v. Prather (1859), 21 Ill. 217, it is stated, that "When the law casts a duty on a party, the performance shall be excused by act of God, but when a party by his own contract engages to do an act, it is deemed his own fault and folly, that he did not expressly provide against contingencies and exempt himself from responsibility in certain events." To this principle a very great abundance may be cited, for example: First Nat. Bank v. McConnell (1908), 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. (N. S.) 616, 123 Am. St. Rep. 336, 14 Ann. Cas. 396.

This distinction between duty cast by law and one arising out of contract is well illustrated in Merriwether v. Quincy O. & R. C. R. Co., 128 Mo. App. 647, 107 S. W. 434, which held that though a railroad is bound to keep on hand cars to accommodate ordinary traffic, yet it is excused from so doing by act of God, but this has no application to a special contract to furnish cars at a particular time and place. And so it has been said that whether the continued existence of the subject-matter of the contract will be implied as a condition of performance of the contract and not a question of inevitable accident excusing nonperformance. Dexter v. Norton (1871), 47 N. Y. 62, 7 Am. Rep. 415.

An interesting case is that of Berg v. Erickson, 234 Fed. 817, 148 C. C. A. 415, where the distinction between a positive agreement and duty imposed by law is pointed out is quite elaborately treated by Sanborn, C. J. It was said: "Whether or not one, who by contract imposes upon himself our obligation or duty, is absolved from liability for his non-performance by a subsequent impossibility of performance caused, without his fault, by an act of God or an unavoidable contract, depends on the true construction of his contract." Many cases are cited in support of this proposition.

But our Supreme Court has held that "where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by merely general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." Chicago, M. & St. P. R. Co. v. Hoyt (1892), 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. 779. In this case it seems, that the distinction between duties imposed by con-

tract and those devolved by law is not so sharp as shown in other cases to which reference is above made. This case makes construction of contract take a wider range than they admit.

Take it, then, that the servant, in the instant case, was expected to maintain the shanty that was destroyed, and it became the duty of the railroad to protect it. In such case it makes no difference what is the measure of its duty, whether of ordinary or extraordinary care, as in either event the act of God excuses it. C.

## BOOK REVIEW

### COLLIER ON BANKRUPTCY—ELEVENTH EDITION.

The first edition of Collier on Bankruptcy appeared in September, 1898, and two months later there was an enlarged edition. Now, in 1917, appears the Eleventh Edition, the intervening editions being by Mr. James W. Eston in 1900, Mr. Wm. H. Hotchkiss in 1903, and the remaining editions, five to seventeen inclusive, being by Mr. Frank B. Gilbert, of Albany, N. Y., bar.

This work's appearance is anticipated with interest by the profession, the plan of the author of the original and third editions being scrupulously followed by the succeeding editors, as it had met the general approval of the profession. It is superfluous further to speak of a work regarded as a necessity, especially as we have enlarged on this subject in various numbers of Central Law Journal. Its copyright in the first two years of the life of this work has been by Matthew Bender & Company, of Albany, N. Y., and the present edition, eleventh, is in the year 1917, reindexed and further enlarged to include new rulings down to date.

## BOOKS RECEIVED.

Handbook of Criminal Procedure. By Wm. L. Clark, Jr., author of Clark's Handbook of Criminal Law and Clark's Handbook of the Law of Contracts. Second Edition. By William E. Mikell, B. S., LL.M., Professor of Law in the University of Pennsylvania. St. Paul. West Publishing Co. 1918. Price $3.75.

## HUMOR OF THE LAW.

Unfortunately we've mislaid the judge's name, but his court-room is in New Bedford, Mass. Before him appeared a defendant who, hoping for leniency, pleaded, "Judge, I'm down and out."

Whereupon said the wise Judge:

"You're down, but you're not out. Six months."—Philadelphia Evening Ledger.

Secretary Daniels, in his Ohio address declared fair and constructive criticism of the government's acts never should be checked, but appealed to the sense of justice of America's citizenship in asking that carping and continual petty criticism be silenced in this time of war.

"Like it is told of a great man who was always critical of everything," he said:

"When this man died, word of his death was carried to Andrew Lang.

"'Poor man, poor man,' said Lang. 'He won't like God.'

In a suit in a Georgia court the attorney for defendant told the jury that his opponent would make some humorous remarks, and that he "would tell a joke at a funeral."

Whereupon, counsel for plaintiff said:

"Gentlemen of the Jury: The learned gentleman has just told you that I would make you laugh and he said that he believed that I would tell a joke at a funeral. If the corpse smiles at us, should we not be permitted to smile at the corpse? When the skeleton is all the time grinning at us, should we not reciprocate? Why, gentlemen, the funniest things which ever occur happen at funerals." And continued: "A certain man married the only daughter of a widow. The young couple decided to go across the ocean on their bridal tour. The mother-in-law decided she would go too. She went. When they got about half way across the ocean, the old lady became ill and died, which was a perfectly natural event; they had no iron weights with which to sink the casket, so they tied a bag of coal to the casket and let her gently down into her watery grave. The *bereaved* son-in-law, commenting on the funeral arrangements, said: 'I—I—a—l—ways k—k—knew w—w—where m—m—my mother-in-law was a—goin', but I—I—I'll be b—b—blamed if I thought she'd have to take her own fuel with her.' Why, gentlemen, a man who would not enjoy a funeral like that has never had a mother-in-law and is not worthy of one."

## WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn*



1. **Alteration of Instrument**—Filling Blanks.—Insertion of words "four months" in blank space before words "after date," held not material alteration of note; payee having prima facie authority to fill in blank in view of Negotiable Instruments Act, § 14.—Howard Nat. Bank v. Arbuckle, Vt., 102 Atl. 477.

2. **Animals**—Running at Large.—Where bull broke inclosure and entered upon plaintiff's land, he was "running at large," within Comp. Laws 1915, §§ 7305, 7306.—Hosley v. Bamber, Mich., 165 N. W. 687.

3. **Assault and Battery**—Shooting at Another.—Unlawfully firing a pistol at another, while near enough him to injure him, if the bullet hits him, is an assault, though the bullet does not hit him.—State v. Lichter, Del., 102 Atl. 529.

4. **Attorney and Client**—Admissions of Record.—In suit by railway against landowners, announcement of their attorney in court, approved by court, held to settle question that landowners' deed to railway was knowingly executed by them as substitute for their prior conveyance.—Oregon-Washington R. & Nav. Co. v. Reed, Ore., 169 Pac. 342.

5.——Contract.—Where, under a contract, plaintiff, an attorney, is to assist a trial attorney as plaintiff shall "consider necessary," it is no defense, in an action on the contract, the execution of which is admitted, that plaintiff was out of town during the trial.—Strong v. Eckert, N. Y., 167 N. Y. S. 1069.

6.——Ratification.—Where one has been made a party plaintiff by unauthorized act of attorney, and before judgment has informal notice thereof, his failure to appear and move to strike his name from record will not, in all circumstances and as matter of law, amount to ratification of such unauthorized act.—Anderson v. Crawford, Ga., 94 S. E. 574.

7. **Bailment**—Benefit of Bailor.—A contractor, who takes cloth on which he is to do work, is only liable for such cloth as a bailee, and can show that his failure to return goods, which he had placed in the hands of a subcontractor, was not due to any lack of care on his part.—Kash v. Krebs, N. Y., 167 N. Y. S. 1035.

8. **Banks and Banking**—Depositor.—Bank whose cashier withdrew from bank the amount of a receipt for money to be transferred to husband's account signed by a depositor and misappropriated, it was liable to depositor's husband.—Gonder v. Farmers' Nat. Bank of Somerset, Pa., 102 Atl. 510.

9.——Special Deposit.—Under Gen. Code, § 4294, a bank knowingly receiving municipal funds from a city treasurer, which it did not hold as a special deposit, and from the use of which it realized profits, was a trustee accountable to municipality for funds and all profit on the deposit.—Franklin Nat. Bank of Newark v. City of Newark, Ohio, 118 N. E. 117.

10. **Bankruptcy**—Exemption.—A bankrupt should not be denied his homestead exemption because of his transfer of homestead, where it was retransferred to him, and transfer was not made with intent to prefer creditors.—In re Najour, U. S. D. C., 246 Fed. 167.

11.—False Representation.—Under Bankr. Act, § 14b, as amended in 1903 and 1910, discharge cannot be denied because of general materially false statement in writing to commercial agency on which creditor extended credit, but which was not made for specific purpose of obtaining credit.—J. W. Ould Co. v. Davis, U. S. C. C. A., 246 Fed. 228.

12.——Preference.—Judgment of referee in bankruptcy, disallowing on objections by trustee, claim against bankrupt's estate on ground that claimant had received preference, is admissible in evidence in subsequent suit by trustee to recover preference.—Ullman, Stern & Krausse v. Coppard, U. S. C. C. A., 246 Fed. 124.

13.——Referee.—Decision of referee, based on hearing where witnesses were personally examined by him, should not be interfered with, unless clearly wrong.—In re Najour, U. S. D. C., 246 Fed. 167.

14. **Bills and Notes**—Evidence.—In action on notes, letters from plaintiff to a defendant, stating plaintiff would look to him for payment of note referred to, written before notes declared on were indorsed by defendant and his wife, were inadmissible.—Kumin v. Fine, Mass., 118 N. E. 187.

15.——Good Consideration.—The acceptance of a note for a portion of an account then due is at least an agreement for delay; the subjecting of the debtor to peculiar liabilities and the affording to the creditor of peculiar rights con-

stituting a good "consideration."—Walter H. Goodrich & Co. v. Friedman, Conn., 102 Atl. 607.

16. **Carriers of Live Stock**—Notice.—Under uniform live stock contract filed with Interstate Commerce Commission, under which interstate shipment was had, held, that written communication by company's local agent at point of destination regarding injury was sufficient notice of claim to warrant recovery.—Snyder v. King, Mich., 165 N. W. 840.

17. **Carriers of Passengers**—Anticipating Injury.—Street railway operating cars in subway was bound to exercise highest degree of care to protect passenger from injury caused by misconduct of other passengers, which ought to have been anticipated.—MacGilvray v. Boston Elevated Ry. Co., Mass., 118 N. E. 166.

18.——Ordinary Care.—Where a suburban trolley, on account of a public improvement in the road, had to transfer the passengers through the woods, it owed at least ordinary care in leading them through the wood and in seeing that the path was reasonably safe.—Pins v. Connecticut Co., Conn., 102 Atl. 595.

19. **Commerce**—Admissibility of Evidence.—While Interstate Commerce Commission in making investigations should not be too narrowly constrained by technical rules as to admissibility of evidence, etc., commissioners cannot act on their own information, and parties must be apprised of evidence.—Atchison, T. & S. F. Ry. Co. v. Spiller, U. S. C. C. A., 246 Fed. 1.

20.——Interstate.—Employe of electric railway which transported interstate shipments, held engaged in "interstate commerce," within federal Employers' Liability Act, when injured boarding car on which track-fixing crew, of which he was a member, rode.—Cholerton v. Detroit, J. & C. Ry., Mich., 165 N. W. 606.

21.——Tax.—A tax under Laws 1911, c. 169, § 11, requiring any company owning cars operated on any railroad in the state, to pay a tax, is not a tax on interstate commerce, in case of cars used only in interstate commerce.—Vera Chemical Co. v. State, N. H., 102 Atl. 463.

22.——Public Service Commission.—Order of state Public Utilities Commission that interstate carrier distribute coal cars in time of shortage to mines within the state, as required by Public Utilities Act, § 52, held not invalid as an interference with interstate commerce, notwithstanding Hepburn Amendment of 1906 to Interstate Commerce Act.—State Public Utilities Commission v. Baltimore & O. S. W. R. Co., Ill., 118 N. E. 81.

23. **Contracts**—Rescission. — Where producer of motion picture was to have share of gross receipts, exhibitor's false reports of the gross recipts and refusal to allow producer access to the books, as agreed, held to justify the producer in rescinding.—Raftery v. World Film Corp., N. Y., 167 N. Y. S. 1027.

24. **Corporations** — Acquiescence. — Acquiescence by stockholders after such length of time and in such circumstances that knowledge of acts done by directors beyond their authority is to be inferred will operate as ratification.—West Side Irr. Co. v. United State, U. S. C. C. A., 246 Fed. 212.

25.——Executed Contract.—A contract whereby plaintiff agreed to sell and a corporation agreed to buy certain stock at a price named, payable on a certain date, was an executed contract, and where plaintiff tendered the stock, the corporation became instantly liable for the price, and when it failed to pay, it became liable for the full sum.—Lewin v. Hanford, Cal., 169 Pac. 242.

26.——Sale.—A contract for sale of its personal property, unauthorized by a corporation, executed by a part of the stockholders in their individual capacity, is insufficient to vest title in the buyer.—Robinson v. Taber, Mich., 165 N. W. 730.

27. **Covenants**—Building Restrictions. — An agreement, canceling existing building restrictions and providing that structures "to be erected" and that "shall be erected" should be private residences, only, did not restrict the use to which existing residences should be put.—Barnard v. Swayne, N. Y., 167 N. Y. S. 1060.

28. **Damages**—Measure of. — To arrive at value of building, to determine damages by fire, where building has no market value cost, uses it has been put to, age, condition, and location should be considered; and price at which an owner contracted to sell it, while competent, is not controlling.—Fite v. North River Ins. Co., Mich., 165 N. W. 705.

29. **Death**—Proximate Cause.—Where deceased would not have died when he did but for cerebral meningitis from injury inflicted by defendant, such meningitis held a concurring proximate cause, for which defendant was liable, though pneumonia was also a concurring cause. —Marks v. Reissinger, Cal., 169 Pac. 243.

30. **Deeds**—Undue Influence.—Where a father, about 95 years old, conveyed his property to a son without any consideration, and without competent, independent advice, the conveyances were void.—Moriarty v. Kelly, N. J. 102 Atl. 443.

31.——Undivided Interest.—Under deed conveying lot and undivided interest in strip of land between lake and parcel of which such lot was a part, held, grantees took title in fee to undivided interest in water frontage, and could make conveyance of lot and retain title to such frontage.—Bell v. Reid, Mich., 165 N. W. 789.

32.——Restriction on Buildings.—Home for nurses of nearby hospital is not "residence," within deed restricting building of other than residences.—Hartwig v. Grace Hospital, Mich., 165 N. W. 827.

33. **Eminent Domain**—Amending Judgment.—A judgment in eminent domain for damages for land taken by a drainage district is not a judgment quod recuperet, but merely an adjudication of just compensation, and when the amount was paid to the county clerk, it was no longer subject to the court's orders, but until accepted could be withdrawn by the district.—Lingle v. Clear Creek Drainage and Levee Dist., Ill., 118 N. E. 77.

34.——Evidence.—In eminent domain, it was not reversible error to admit testimony that the property owner's estimate of value for purpose of taxation was lower than stated in his testimony in the eminent domain proceedings, where the amount of the assessment was not permitted to be proved.—McGaw v. City of Baltimore, Md., 102 Atl. 544.

35.——Similar Public Use.—Property already appropriated to one public use cannot thereafter be condemned for inconsistent public use unless such taking is authorized expressly or by clear implication, and this rule applies to property about to be lawfully appropriated to a public use, though appropriation is not complete.—East Hartford Fire Dist. v. Glastonbury Power Co., Conn., 102 Atl. 592.

36. **Equity**—Foreign Corporation.—Where one purchases stock and enters into a contract with a foreign corporation which cannot make a valid contract because of failure to comply with state laws, and he repudiates the transactions, and there is no showing of fraud or concealment or insolvency, there is an adequate remedy at law and equity has no jurisdiction.—Flint v. Le Heup, Mich., 165 N. W. 626.

37.——Escrows.—Under husband's written contract to convey homestead, occupied by himself and wife, the wife having been coerced to sign the contract, the person holding a deed for premises in escrow has no authority to deliver it to purchaser.—Ambler v. Jones, Neb., 165 N. W. 886.

38. **Estoppel** — Conveyance. — There is no estoppel under deed conveying house lots on way, describing them as bounded westerly by easterly line of way, and granting grantor's rights in common with other tenants in way of ingress and egress, etc., where title came back into grantor, and parties adverse to his successors claim nothing thereunder.—Apsey v. Nash, Mass., 118 N. E. 180.

39.——Duress.—Where complainant, ignorant negro, was acting under duress when, defendant sued out distress warrant and subjected crops raised on land sold complainant under parol contract to alleged claim for rent, defendant cannot set up, as estoppel barring specific performance, proceedings under distress warrant.—Hicks v. Fordham, U. S. C. C. A., 246 Fed. 236.

40.——Husband and Wife.—Where plaintiff's husband in 1909, executed and delivered warranty deed, apparently, though not actually, executed and acknowledged by wife, and where she, with knowledge, acquiesced and accepted and retained benefits, and did not bring action for partition, etc., until 1915, she was equitably estopped from maintaining action.—Fuller v. Johnson, Minn., 165 N. W. 874.

41. **Fraud** — Misrepresentation. — Where defendant, selling motion picture theater to plaintiff, misrepresented it was doing profitable business, matter peculiarly within his knowledge, he could not deny liability for fraud on ground plaintiff should have made further investigations and that doctrine of caveat emptor applied.—Johnson v. Campbell, Mich., 165 N. W. 823.

42. **Frauds, Statute of**—Contract.—A verbal contract by an execution creditor extending the time for redemption is not within the statute of frauds.—Pellston Planing Mill & Lumber Co. v. Van Wormer, Mich., 165 N. W. 724.

43.——Contract for Services.—An oral contract for services in consideration of payment when promisor should receive share of estate of his father, not then deceased, merely fixed time of payment and hence was not within statute of frauds as creating an interest in land.—Macfarland v. Callahan, Neb., 165 N. W. 889.

44. **Fraudulent** Conveyances — Consideration.—Where a man owed his sister nearly $500, and had owed it for seven years, satisfaction thereof was not sufficient consideration as against creditors, to sustain his deed of all property bringing in a net income of over $900 a year, though the sister further agreed to support him for life.—Wilmer v. Placide, Md., 102 Atl. 541.

45.——Intent.—Where plaintiff sued his debtor, who, with intent to defraud, conveyed to another, and later, to cover a defalcation of the debtor, a trust agreement was made in favor of defendant by which defendant advanced the money to care for the defalcation in return for a mortgage on the lots, defendant, having had no previous notice of the fraudulent intent, acquired good title in view of L. O. L., § 7401.—People's Bank v. Rostad, Ore., 169 Pac. 347.

46. **Gas**—Deposit by Consumer.—Where consumer contracted separately for electric current and for gas with same company, depositing $20 on electric current contract, company was not required to apply deposit to arrears on gas bill before shutting off supply.—Annapolis Public Utilities Co. v. Martin, Md., 102 Atl. 465.

47. **Habeas Corpus**—Day in Court.—Person denied full and fair hearing on claim of exemption under the Conscription Act, may, if restrained of his liberty, sue out a writ of habeas corpus.—Angelus v. Sullivan, U. S. C. C. A., 246 Fed. 54.

48.——Jurisdiction.—Excess of sentence beyond jurisdiction of court which imposes it, in case in which it has ample jurisdiction of subject-matter of case and of parties, is void, and prisoner held under such excess alone is entitled to his release by habeas corpus.—Stoneberg v. Morgan, U. S. C. C. A., 246 Fed. 98.

49. **Highways**—Husband and Wife.—The wife of one obstructing a highway need not be joined in action to enjoin the obstruction, merely because she is a co-owner with him of the adjoining premises.—Sherwood v. Ahart, Cal., 169 Pac. 240.

50. **Husband and Wife**—Divorce.—Where wife holding title to property conveyed by husband, gave him power of attorney to sell or transfer, power did not authorize him to convey to himself through intermediary just before he sued for divorce for desertion.—English v. English, Mass., 118 N. E. 178.

51.——Tenancy in Common.—Where husband and wife agreed to convey their farm, held as tenants in common, to nephew in return for his support, wife's refusal to join in conveyance and perform did not terminate contract.—Lavoie v. Dube, Mass., 118 N. E. 179.

52. **Injunction**—Covenant.—Where a landlord covenanted not to rent another part of his building to any business selling candy, ice cream, light lunches, soda water, or other things sold in the business of general confectioners, injunction will not be granted to enjoin the installing of a restaurant where the "light lunch" feature was not relied on for the injunction.—Shean v. Weeks, Cal., 169 Pac. 231.

53. **Insurance**—Breach of Condition.—Insurance contract conditioned to become void on breach of condition present or subsequent, does not mean that upon breach contract is a nullity,

but only that upon insured's breach of covenants insurer shall not be bound by his covenants.—Beauchamp v. Retail Merchants' Ass'n Mut. Fire Ins. Co., N. D., 165 N. W. 545.

54.——Evidence.—That local agent issued all policies of fire insurance on building is of considerable probative force that building was worth more than it was insured for, where other competent evidence is lacking.—Fite v. North River Ins. Co., Mich., 165 N. W. 705.

55.——Indemnity.—Under policy indemnifying employer against loss by injury to employes, but expressly excluding "demolition or wrecking of any structure," injury during removal of partition wall in course of remodeling and repairing adjoining buildings was not within exception.—Pilgrim v. Aetna Life Ins. Co., N. J., 102 Atl. 445.

56.——Special Agent.—Under a special agent's contract to solicit life insurance, etc., providing that "during the continuance of the agreement" without any violation of its terms he should be paid certain commissions on renewal premiums, he was not entitled thereto after termination of contract.—Bowles v. Sawyer, Me., 102 Atl. 562.

57.——Sunstroke.—Sunstroke of traffic policeman while performing his duties in usual way, held within policy insuring against bodily injuries sustained solely through accidental means.—Higgins v. Midland Casualty Co., Ill., 118 N. E. 11.

58.——Fatal Disability.—Under health policy requiring payment for illness wholly preventing assured from performing any duty, during which he shall be necessarily confined to the house, assured could not recover for an illness which practically incapacitated him, but during which he visited his office for a few minutes each day, and also called upon a doctor each day.—Pirscher v. Casualty Co. of America, Md., 102 Atl. 546.

59. **Intoxicating Liquors**—Intent.—The fact that a druggist stored five quarts of whisky in his home is not sufficient evidence, standing alone, to show intent to dispose of it unlawfully, nor to show any violation of Rem. Code 1915, §§ 6262—1—6262—33.—State v. Snell, Wash., 169 Pac. 320.

60. **Landlord and Tenant**—Lease.—In action for damages for refusal to permit plaintiff to go into possession of premises, which he claimed had been leased by defendant, charge that agreement was a lease, unless made subject to collateral conditions, and unless there was to be a formal lease to be delivered thereafter, was erroneous, taking from jury question whether parties made lease or agreement to make a lease.—Garber v. Goldstein, Conn., 102 Atl. 605.

61.——Repairs.—Where there was no competent evidence, at time tenant paid rent and went into possession, of an agreement on such day to repair a walk, any subsequent agreement to repair would be without consideration and unenforceable.—Brown v. Gray, Mich., 165 N. W. 624.

62.——Waiver.—The tender of a bill for the rent reserved under a lease and the acceptance of payments thereunder was a waiver of any defaults by the lessee existing prior to that date.—Commercial Trust Co. v. L. Wertheim Coal & Coke Co., N. J., 102 Atl. 448.

63. **Life Estate**—Receivership.—Life tenant must keep premises in such repair as to preserve property from decay, to extent at least of its rental value, and, on his neglect to do so, receiver will be appointed to collect rents sufficient to pay taxes and for repairs.—Woolston v. Pullen, N. J., 102 Atl. 461.

64. **Master and Servant**—Accident.—Railroad car inspector injured while taking short cut to report to railroad with which his employer exchanged services of employes under certain conditions, held hurt by accident arising out of his employment within Workmen's Compensation Act.—In re Maroney, Ind., 118 N. E. 134.

65.——Accident.—In a proceeding for compensation under Indiana Workmen's Compensation Act for death of a janitor by an electric shock while cleaning a room wherein he had been forbidden to enter and against which he had been warned, evidence held sufficient to sustain a finding that the accident arose out of and in the course of his employment.—Northern Indiana Gas & Electric Co. v. Pietzvak, Ind., 118 N. E. 132.

66.——Assumption of Risk.—One employed to operate a drilling machine in a mine, held not as a matter of law to assume risk of injury from falling rock at place other than his immediate place of work, though he was required to inspect his place of work.—Ulrich v. Utah Apex Mining Co., Utah, 169 Pac. 263.

67.——Burden of Proof.—It was not incumbent on claimant for compensation for death under Workmen's Compensation Act to show it was for best interests both of her and of employer to have compensation commuted to lump sum.—Schwarm v. George Thomson & Sons Co., Ill., 118 N. E. 95.

68.——Contributory Negligence. — Employe's failure to place blue flag in front of railroad car under which he was working, as required by a rule, held not contributory negligence, unless he had been instructed to do this.—Campbell v. New York, N. H. & H. R. Co., Conn., 102 Atl. 597.

69.——Course of Employment.—Under Workmen's Compensation Act (Rev. St. 1913, § 3651) providing compensation for injury to an employe "by accident arising out of and in the course of employment," compensation is not recoverable for a disease unless it is traceable to an "accident" as defined by § 3693.—Blair v. Omaha Ice & Cold Storage Co., Neb., 165 N. W. 893.

70.——Course of Employment. — A bridge builder having finished work for the day, when struck by lightning while sitting in the boarding tent furnished by the employer, did not receive an injury arising out of his employment.—Griffith v. Cole Bros., Ia., 165 N. W. 577.

71.——Course of Employment. — Although when night switchman was injured, he had completed his hours of active service for night, and was proceeding to entrance of plant to register out, which was a further duty of his employment, his injury was suffered in the course of the employment.—Inland Steel Co. v. Lambert, Ind., 118 N. E. 162.

72.——Dependency.—On issue of dependency, son's contribution of $27 to his father, though given for purchase of articles of household furniture, could have been adjudged a "contribution to support" of the father within Workmen's Compensation Act.—In re McMahon, Mass., 118 N. E. 189.

73.——Hours of Service Act.—If sudden sickness of a railroad telegraph operator was emergency, within Hours of Service Act, § 2, held, that carrier could not escape liability where operator then on duty, before being relieved, was kept on duty for more than 13 hours, though there was another operator near by who might have been called.—United States v. Delano, U. S. C. C. A., 246 Fed. 107.

74.——Safe Place.—The rule of safe place, as generally understood, cannot apply where employe of owner of building in course of construction was injured by fall of scaffolding which he was engaged in constructing and working on.—Porth v. Cadillac Motor Car Co., Mich., 165 N. W. 698.

75.——Workmen's Compensation Act.—Where a fence builder for a railroad reported each morning at a station for instructions and was paid from the time he left the station, but one morning on account of rain he did not go to the station and the foreman came and asked him to work and he went down the track, direct for the work and was killed on the way, the relation of master and servant existed, within Workmen's Compensation Act.—Porritt v. Detroit United Ry., Mich., 165 N. W. 674.

76.——Workmen's Compensation Act.—Where fire insurance agent slipped on icy sidewalk while proceeding from his train to hotel in town to which his employer had sent him, injury arose out of his employment within Workmen's Compensation Act.—In re Harraden, Ind., 118 N. E 142.

77.——Workmen's Compensation Act.—Employe driver who sat down near boiler fire while waiting opportunity to use elevator in his work, fell asleep, and caught fire, held injured in course of his employment within Workmen's Compensation Act.—Richards v. Indianapolis Abattoir Co., Conn., 102 Atl. 604.

78. **Municipal Corporations** — Discretion — Under Gen. Code, § 10129, empowering municipality to grant franchise subject to "regulations and restrictions," etc., its officers have large latitude, and unless expressly limited, may exercise such power in any reasonable way compatible with best service and greatest advantage to it.—Federal Gas & Fuel Co. v. City of Columbus, Ohio, 118 N. E. 103.

79.——Intoxication. — Under supplement of 1913, to Disorderly Persons Act (P. L. 1913, p. 103), making it an offense to drive an automobile upon a public street "while under the influence of intoxicating liquors," covers the usual conditions of intoxication, though one need not be so intoxicated that he cannot safely drive a car.—State v. Rodgers, N. J., 102 Atl. 433.

80.——Licensee.—Pedestrian injured by the fall of awning while waiting for street car did not forfeit her rights as licensee on public streets by lingering in front of shop window.—Leighton v. Dean, Me., 102 Atl. 565.

81.——Nuisance.—Offense of driving an automobile upon a public street while under influence of intoxicating liquor, prohibited by supplement of 1913 to Disorderly Persons Act (P. L. 1913, p. 103), is complete when thing prohibited is done, as distinguished from a public or common nuisance which is not committed unless and until there is inconvenience or annoyance to public.—State v. Rodgers, N. J., 102 Atl. 433.

82.——Registration of Motor Vehicles.—The word "owner," in Motor Vehicle Law, §§ 2, 19, providing that no suit could be had for injuries to a car unless the owner registered it, refers to any person having an interest in the property even under a special title.—Brown v. New Haven Taxicab Co., Conn., 102 Atl. 573.

83.——Sidewalks.—In an action against a city on account of a defective walk, where the question was whether the walk would have washed out if properly constructed, it was error to admit evidence of the defendant that the walk was put in again properly and that it washed out, where the amount of rainfall in the first instance was much less than in the second instance.—Kethledge v. City of Petoskey, Mich., 165 N. W. 788.

84.——Street Grading. — Resolution ratifying erection of retaining wall necessitated by grading of street, where committee acted in response to informal direction of common council, is as valid as if work had not been done until after passage of resolution.—Hackett v. Hussels, N. J., 102 Atl. 527.

85. **Partition**—Action for.—One who had parted with all his right, title and interest in vein of coal under lands in which he retains interest could not maintain proceeding to partition entire tract, including coal.—In re Young's Estate, Pa., 102 Atl. 506.

86. **Principal and Agent**—Evidence. — The agency of the men with whom plaintiff dealt in purchasing lots is sufficiently shown by defendants' acceptance of the notes given by him and by their execution and delivery of land contracts.—Billig v. Goodrich, Mich., 165 N. W. 647.

87.——Proof of Agency.—Where bank cashier withdrew a certain amount from a depositor's account, that he deposited with bank's papers a receipt signed by himself for depositor, did not establish his agency to withdraw amount, or justify the submission of question of agency to jury.—Gonder v. Farmers' Nat. Bank of Somerset, Pa., 102 Atl. 510.

88.——Scope of Agency.—Selling agent, apparently authorized to do automobile company's business, could convey good title to bona fide purchaser of automobile belonging to company, although in making the sale he failed to disclose that he was acting as agent.—Lister, Smith & Walsh Co. v. Smith, R. I., 102 Atl. 514.

89. **Railroads**—Crossings.—In suit by railway against landowners to enjoin interference with right of way and to quiet title, trial court properly restricted right of landowners to private crossing of track to be maintained by them at place designated in latest conveyance to railway's predecessor.—Oregon-Washington R. & Nav. Co. v. Reed, Ore., 169 Pac. 342.

90. **Sales**—Fraudulent Statement. — Horse with the glanders at any stage is not "sound," and to so state is fraudulent.—Weinberg v. Ladd, Mich., 165 N. W. 711.

91. **Specific Performance**—Evidence.—A town seeking specific performance of option to buy waterworks cannot take without pay parts not laid or the price of which was not ascertained as provided by the contract.—Town of Boonton v. United Water Supply Co., N. J., 102 Atl. 454.

92. **Street Railroads** — Contributory Negligence.—An automobile driver who crosses a street car track without looking in the direction from which a street car has just passed, but who looked in that direction when 60 to 120 feet away, and who knew that at that time cars were usually hurrying in that direction to the car barns, is guilty of contributory negligence.—Congdon v. Michigan United Traction Co., Mich., 165 N. W. 744.

93. **Sunday**—Contract.—A conversation between the tenant and the landlord's janitor on Sunday, by which the janitor agreed that a walk should be repaired, does not constitute a valid contract with the landlord.—Brown v. Gray, Mich., 165 N. W. 694.

94. **Vendor and Purchaser** — Estoppel. — Where married men contracted to sell land, title to which was held by their wives, although evidence indicated they were not the owners, purchaser, not having been injured and deed from wives having been tendered, cannot defeat contract on ground that it was induced by fraudulent representations.—Crump v. Schneider, U. S. C. C. A., 246 Fed. 225.

95. **Waters and Water Courses**—Abandonment.—Where defendant mutual irrigation company executed contract with government, limiting its appropriation of water, and government proceeded with reclamation project based on such contract, defendant cannot defeat contract on theory that it should not be construed as abandonment of rights of its stockholders.—West Side Irr. Co. v. United States, U. S. C. C. A., 246 Fed. 212.

96.——Option.—A town under option to purchase waterworks, providing for pipes being laid with its approval, may not take such parts only as it approved; the subsequent resolution of council, vote of people, and prayer of bill being for system as in use.—Town of Boonton v. United Water Supply Co., N. J., 102 Atl. 454.

97. **Wills**—Intent.—It being probable that when testatrix used expression "my whole estate, real and personal," it was equivalent to saying "all my real estate and personal property," intent may be gathered from will in light of surrounding circumstances.—Moseley v. Bogy, Mo., 198 S. W. 847.

98.——Unincorporated Association. — Under will devising property to "Allegheny County Children's Aid Society of Allegheny County, Pennsylvania," a then existing unincorporated body known as Children's Aid Society of Allegheny County, thereafter incorporated, was entitled to property as against an organization known as the Children's Aid Society of Western Pennsylvania, Allegheny County Auxiliary.—In re Neel's Estate, Pa., 102 Atl. 503.

99.——Life Estate.—Devise "to J. his natural life, * * * and upon his death to his children, if any, and if he should die without leaving any living children or should die with children and they should die, thereupon or at their death * * * to be equally divided between C., C., and S.," gave a life estate to J., with remainder in fee to his children, and, there being children, C., C., and S., would receive nothing unless both J. and his children should die before the testatrix.—Bibby v. Broome, Miss., 76 So. 835.

100.——Wife's Life Estate.—Under will devising all testator's property to his wife in trust, for benefit of herself and her children, and giving her its entire use and management for life, with power of sale, etc., she took only a life estate in an undivided interest in the property.—Patterson v. Gaissert, Ga., 94 S. E. 563.